

Supreme Court, U. S.

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No. 75-1632

In the Supreme Court of the United States

OCTOBER TERM, 1975

NICHOLAS L. BIANCO, PETITIONER

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT*

BRIEF FOR THE UNITED STATES IN OPPOSITION

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**OPINION BELOW**

The opinion of the court of appeals (Pet. App. 1a-19a) is not yet reported.

**JURISDICTION**

The judgment of the court of appeals was entered on April 8, 1976 (Pet. App. 1a). The petition for a writ of certiorari was filed on May 7, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

**QUESTION PRESENTED**

Whether the evidence in this prosecution for willful failure to file income tax returns was sufficient to establish that petitioner's expenditures were derived from currently taxable income.

## STATEMENT

After a jury trial in the United States District Court for the Eastern District of New York, petitioner was convicted of five counts of willfully failing to file income tax returns for the years 1967 through 1971, in violation of 26 U.S.C. 7203. The district court sentenced him to consecutive terms of one-year imprisonment on each of the five counts, suspended sentence on the fifth count, and placed petitioner on probation for five years following completion of the four one-year sentences. The court also fined petitioner \$10,000 on each of the five counts. The court of appeals affirmed (Pet. App. 1a-19a).

At trial, the government employed the cash expenditures method of proof. The evidence showed that petitioner had the following adjusted gross income and resulting tax due during the five prosecution years:

Year	Adjusted Gross Income	Tax Due
1967	\$ 4,284.68	\$ 547.00
1968	\$ 5,924.99	\$ 564.10
1969	\$ 6,898.25	\$ 757.60
1970	\$ 8,916.49	\$ 932.42
1971	\$10,217.01	\$1,035.87

These figures were computed from documented expenditures made by petitioner from such items as automobile payments, apartment rental, payments for utilities, insurance payments, doctor's and hospital bills, together with estimates of his food, clothing and personal care expenses based upon Bureau of Labor Statistics data

(R. 488a-495a).<sup>1</sup> In addition, Shayne Peters, petitioner's former girlfriend, testified that during the first eight months of 1967, petitioner entertained her at his expense at a number of fashionable night clubs on no less than 46 different occasions (R. 346a-370a).

The government also introduced evidence that showed specific sources of income. In a loan application made in 1968, and again in an insurance claim filed that same year, petitioner stated that he was self-employed at the Easy Floor Waxing Company (Pet. App. 8a-9a). In an application for a lease filed by petitioner in May, 1968, he stated that he was self-employed with income of \$125.<sup>2</sup>

There was also evidence that petitioner had participated in a "loan-sharking" transaction in the spring of 1967 (Pet. App. 9a). In this particular transaction, petitioner loaned Joseph Rabinovich \$10,000, on which he charged interest of \$250 per week (an annual rate of 130 percent per year) (R. 439a-441a, 460a). Rabinovich made eight interest payments of \$250 each and then paid off the full \$10,000 amount (R. 441a-457a). While the payments were made to several individuals (R. 458a), Ms. Peters testified that petitioner had told her that he had made the loan to Rabinovich (R. 415a), that the interest was very high, and that he would arrange for another man to give Rabinovich enough money to take care of the loan (R. 372a-373a, 415a-416a). She further testified that Rabinovich had told her that petitioner "came up with the money to his office" (R. 416a).

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<sup>1</sup>"R." refers to the two-volume record appendix filed in the court of appeals on behalf of petitioner.

<sup>2</sup>There was no indication of whether this was weekly or monthly income (Pet. App. 9a, n. 6).

In order to establish an appropriate starting point for the net worth computation, the government introduced evidence that petitioner had no accumulated assets as of January 1, 1967, the beginning of the prosecution years. The evidence was that there was an outstanding judgment for \$436.40 entered in 1965 against petitioner that could not be collected in 1966 (Pet. App. 6a) and that a 1965 Buick automobile previously purchased by petitioner was repossessed in December, 1966 (R. 223a). For the limited purpose of establishing an opening net worth figure, the trial court also permitted the introduction of evidence that petitioner had not filed tax returns for 1963, 1964, and 1965, after having filed a return for 1962 showing a small amount of income (Pet. App. 5a-6a).

Finally, the investigation conducted by Special Agent Louis Nahmias failed to disclose any evidence that petitioner had accumulated any assets prior to the prosecution years (Pet. App. 4a-5a). Agent Nahmias checked everything at his disposal concerning sources of income (R. 280a, 294a-295a). He tried to find out if petitioner was employed and searched for specific items of income—"any kind, any type, whether it be salary or self-employment income" (R. 285a-288a).

For example, Agent Nahmias circularized approximately 100 banks, all of which responded that they had no accounts or assets in petitioner's name (Pet. App. 5a). He checked the official records in Kings County, New York, and could find no record of any real estate in petitioner's name (Pet. App. 5a). He also checked brokerage house records for possible securities owned by petitioner, as well as insurance brokers, physicians, schools, hospitals, banks, the telephone company, the electric company, petitioner's landlords and an automobile dealership in his search for assets and expend-

itures during the prosecution years (Pet. App. 5a; R. 282a-296a).<sup>3</sup> Agent Nahmias was unable to locate any accumulated assets or sources of nontaxable income (Pet. App. 5a).

At the close of the government's case, petitioner rested without presenting any defense or offering any evidence (Pet. App. 6a).

#### ARGUMENT

1. Under the well-established "cash expenditures" method of proof employed by the government in this prosecution, petitioner's taxable income was reconstructed by establishing the amounts he expended during each year in issue for purchases of goods and services, and deducting therefrom all expenditures made from assets accumulated prior to the prosecution period and from nontaxable income received during the year. See, e.g., *Taglianetti v. United States*, 398 F.2d 558, 562 (C.A. 1). See also *United States v. Newman*, 468 F.2d 791 (C.A. 5), certiorari denied, 411 U.S. 905; *United States v. Penosi*, 452 F.2d 217 (C.A. 5), certiorari denied, 405 U.S. 1065. The accuracy of the computation requires the establishment with reasonable certainty of the taxpayer's accumulated assets on hand at the beginning of the prosecution year. *Taglianetti v. United States*, *supra*, 398 F.2d at 565; *United States v. Fisher*, 518

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<sup>3</sup>Agent Nahmias also checked the records of the Probate Clerk in Providence, Rhode Island for possible inheritances. In his search for possible inheritances, the agent also interviewed petitioner's sister (Pet. App. 5a).

F.2d 836, 842, n. 7 (C.A. 2), certiorari denied, No. 75-418, December 16, 1975.<sup>4</sup>

Petitioner argues (Pet. 6) that the government's proof failed to establish with reasonable certainty his accumulated assets at the beginning of 1967, the first prosecution year. Specifically, he asserts (Pet. 6) that "the Government showed only that a relatively small judgment went uncollected and that a car had been repossessed" to establish that he had no significant assets in the pre-prosecution years. But petitioner's argument ignores the testimony of Agent Nahmias that his extensive investigation did not uncover any accumulated assets at the start of the prosecution years (R. 275a-327a). This testimony, coupled with the evidence petitioner cites and his failure to file tax returns for the years 1963 through 1965 (after having filed a return for 1962 showing a small amount of income), amply supports the conclusion of the court of appeals that "[t]he totality of this evidence clearly was sufficient for the jury to have concluded that Bianco had insufficient assets at the beginning of the prosecution period to

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<sup>4</sup>In *Taglianetti v. United States, supra*, 398 F.2d at 562, the court distinguished the "net worth" method and the "cash expenditures" method as follows:

The net worth method involves the ascertaining of a taxpayer's net worth positions at the beginning and end of a tax period, and deriving that part of any increase not attributable to reported income. This method, while effective against taxpayers who channel their income into investment or durable property, is unavailing against the taxpayer who consumes his self-determined tax free dollars during the year and winds up no wealthier than before. The cash expenditure method is devised to reach such a taxpayer by establishing the amount of his purchases of goods and services which are not attributable to the resources at hand at the beginning of the year or to non-taxable receipts during the year.

have supported his expenditures in any of those years" (Pet. App. 6a).<sup>5</sup>

2. Petitioner also argues (Pet. 6-8) that the government did not establish an opening net worth for each year. But unlike the net worth method of prosecution, the cash expenditures method does not require proof of an opening net worth for each taxable year. All that is required is proof of the taxpayer's expenditures from nontaxable sources. See n. 4, *supra*.

*Dupree v. United States*, 218 F.2d 781 (C.A. 5), upon which petitioner relies (Pet. 6-7), is in accord with the decision below. In *Dupree*, the court held that in a cash expenditures case the government had to show expenditures *in excess* of the total of the funds available at the beginning of the year and the funds accumulated during the year which are disclosed on the tax return. This is precisely what was done here.

Agent Nahmias' investigation established that there were no assets in petitioner's name at the start of the first year and that no assets were accumulated in any prosecution year. Petitioner did not testify or produce any evidence at trial which would indicate that his expenditures in any year came from accumulated assets.

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<sup>5</sup>As the court of appeals noted (Pet. App. 3a), petitioner made expenditures in each prosecution year far in excess of the amount which, had the money been derived from taxable income, would have required him to file returns for each year. In addition, the government offered evidence of a likely source for the money expended by petitioner during the prosecution years (Pet. App. 4a-9a). It was this evidence of a likely source, "together with the evidence of the government's fruitless search for sources of non-taxable income," which led the court of appeals to conclude (Pet. App. 9a) that all the evidence viewed as a whole was "sufficient to support an inference by the jury that the expenditures proved were attributable to currently taxable income."

Under these circumstances, the government's evidence that petitioner had no assets at the beginning of each year was sufficient to show that the expenditures in any one year came from funds acquired in that year.

#### **CONCLUSION**

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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JUNE 1976.